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No. 86-933

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

CHARLES H. DALE

Petitioner,

v.

CHICAGO TRIBUNE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF RESPONDENT CHICAGO TRIBUNE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL A. WARNER*
JOHN W. POWERS
GEORGEANNE H. TILSON
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Respondent

* Counsel of Record

Pandick Technologies, Inc., Chicago • (312) 236-0200

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Court below erred in granting summary judgment to the employer in an action brought under the Age Discrimination in Employment Act.

STATEMENT REQUIRED BY RULE 28.1

Chicago Tribune Company is a wholly-owned subsidiary of Tribune Company. All of Chicago Tribune Company's subsidiaries and Tribune Company's subsidiaries are wholly owned. Should the Court desire disclosure of wholly-owned subsidiaries of either of these entities, Chicago Tribune Company will supplement its list of subsidiaries.

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Respondent opposes the Petition for a Writ of Certiorari because this case does not merit review by this Court. The issue herein is merely whether the District Court properly granted, and the Court of Appeals properly affirmed, summary judgment in favor of the employer in a routine, single plaintiff employment discrimination case.

The decision below does not raise any new or important question of federal law, nor is the decision in conflict with or inconsistent in any way with the decisions of this Court or any other circuit. Rather, the Court of Appeals decision adheres strictly to the long-standing legal principles applicable to employment discrimination cases established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny.

COUNTERSTATEMENT OF THE CASE

Petitioner filed this lawsuit in 1983, following the termination of his employment as Purchasing Manager at the Chicago Tribune in April, 1982. Petitioner alleged that his discharge violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621, *et seq.*, the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq.*, and an alleged Illinois common law duty of good faith and fair dealing.

In discovery, both parties responded to interrogatories and produced voluminous documents. Most significantly, a lengthy deposition was taken of Petitioner in which it became abundantly clear that the crux of his complaint was simply his personal disagreement with his superior's evaluation of his performance. Accordingly, the Tribune filed a summary judgment motion and presented affirmative evidence from Petitioner's own deposition and related documents to show that under Petitioner's own version of the facts, accepted as true for purposes of the motion, there was no genuine issue of fact entitling him to a trial on any of his claims.

The district court carefully considered the summary judgment issues, in all instances giving Petitioner every benefit of the doubt. On the principal ADEA claim, the court found that Petitioner had not satisfied the reasonable expectations of either the new president or the new vice president (to whom Petitioner directly reported) since a new senior management team had been installed in early

1981. Thus, the court concluded that, as a matter of law, Petitioner could not meet all the requisite elements of a *prima facie* case as set by this Court in *McDonnell Douglas* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Petitioner's Appendix at 29a.

While this would normally end the analysis, the district court, exercising what it described as "an abundance of caution" (Petitioner's Appendix at 29a), went on to assess whether Petitioner's evidence could demonstrate a genuine issue of fact on the issue of whether the Tribune's dissatisfaction with his job performance was a pretext for age discrimination. However, Petitioner's only evidence of pretext (other than his own subjective beliefs and self-evaluations) was a listing of other Tribune employees in the ADEA protected class who had left the Company for a wide variety of reasons other than termination, including retirement, resignation, promotion (to the parent company) and even death. The district court correctly concluded that Petitioner's mere assertion of age discrimination as a possible explanation for these myriad departures was insufficient to meet his evidentiary burden under Rule 56(e). Petitioner's Appendix at 31a.[1]

In affirming the summary judgment decision, the Court of Appeals was similarly careful in considering each of Petitioner's arguments and found them equally unconvincing. The Seventh Circuit reiterated that Petitioner had submitted no evidence, other than his own perceptions, to support his assertion that his performance was adequate (Petitioner's Appendix at 11a) and made an extensive analysis of his "statistical evidence," finding that it was

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[1] The district court's complete deference to Petitioner's rights as a party opposing summary judgment was further demonstrated by the court's full consideration of his ERISA and common law claims, despite Petitioner's total failure to respond to the summary judgment motion on these claims as required by Rule 56(e). *See* Petitioner's Appendix at 32a-35a.

"riddled with defects." Petitioner's Appendix at 13a. Thus, the Court of Appeals concluded that "Dale's self-interested, conclusory assertions of discrimination when combined with his dubious statistical evidence are not adequate to rebut the Tribune's proffered explanation for Dale's discharge, namely, poor job performance." Petitioner's Appendix at 14a.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH THE ADEA AND *BURDINE*

The real crux of Petitioner's argument is simply that the courts below erred in their finding that there was no genuine issue of material fact such that a trial on the merits was necessary. More specifically, he contends that he was performing satisfactorily in his job duties and that his supervisors did not evaluate his performance correctly. However, in an effort to obtain certiorari, Petitioner veils his argument by claiming that the decisions below will somehow jeopardize the viability of the ADEA by encouraging employers to move for summary judgment in such cases and that the decisions below are inconsistent with this Court's decision in *Burdine*. Petition at 7. These arguments have no basis in law or in the facts of this case and do not entitle him to review in this Court.

Contrary to Petitioner's claims, a summary judgment ruling in favor of an employer in no way undermines the purpose of the ADEA. The purpose of the ADEA is to prohibit discrimination on the basis of age, not to give preferential treatment to members of the ADEA protected class. *Cf. Burdine*, 450 U.S. at 259. Nor is it the purpose of the ADEA to put the courts in the position of determining whether an employer's assessment of an employee's performance is correct or not. As this Court noted in the context of Title VII in *Burdine*, "The fact that a court may think that an employer misjudged the qualifications of the applicants does not in itself expose him to Title VII

liability." 450 U.S. at 259. The same holds true in the context of an ADEA claim, whether it be a hiring or termination case. *See, e.g., Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980) ("The [ADEA] . . . was not intended as a vehicle for judicial review of business decisions."); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982) ("[A]n employer may make a subjective decision to discharge an employee for any reason that is not discriminatory."); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1166n.8 (8th Cir. 1985).[2]

As for Petitioner's contention that the decision below disregards the procedural safeguards of *Burdine*, the record discloses that Petitioner was afforded every conceivable opportunity to avoid summary judgment, but he simply failed to convince the courts below that his claims warranted a trial. Thus, both the district court and the court of appeals found that Petitioner could not even establish a *prima facie* claim of discrimination because the evidence demonstrated that he was not meeting the legitimate expectations of his employer. Nevertheless, both courts went on to consider whether any of Petitioner's evidence could show that the employer's articulated reasons were a pretext for discrimination. When the only evidence put forth by Petitioner was his defective "statistical evidence," the courts properly concluded that he had failed to rebut the employer's explanation for his discharge. A more thorough adherence to the precepts of *Burdine* can hardly be imagined.

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[2] Petitioner also attempts to call attention to the district court's comments concerning the impact that corporate reorganizations may have on long-standing managers. (Petition at 3). The court's comments were nothing more than truisms and, in any event, were made in *dicta* unrelated to the court's consideration of the evidence and its ruling. Thus, Petitioner cannot contend that such comments constituted a reversible error of law.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *CELOTEX* AND *ANDERSON*

Having failed to show how the decision below violates either the substantive or procedural requirements of the ADEA, Petitioner attempts to bootstrap his claim to this Court's recent summary judgment rulings in *Celotex Corp. v. Catrett*, ___U.S.___, 106 S.Ct. 2548 (1986) and *Anderson v. Liberty Lobby, Inc.*, ___U.S.___, 106 S.Ct. 2505 (1986). In both instances, Petitioner misconstrues the import of these decisions and their impact on Rule 56 proceedings.

The issue in *Celotex* was what, if any, affirmative evidentiary showing was required of a moving party under Rule 56 with respect to a dispositive issue on which the nonmoving party will bear the burden of proof at trial. The Court held that a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." *Celotex*, 106 S.Ct. at 2553. This is precisely the type of evidence relied on by the Tribune herein.[3]

While *Celotex* focused on the initial burden of production of evidence placed by Rule 56 on the party moving for summary judgment, the *Anderson* decision addressed the burden imposed on the adverse party to respond to a properly supported summary judgment motion. The Court held that under Rule 56, "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." 106 S.Ct. at 2511; citations omitted. The Court added, "The mere existence of a scintilla of evidence in support of the plaintiff's position

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[3] Petitioner objects to the Tribune's reliance on his own deposition (Petition at 8), but, as noted by both courts below, it was his own testimony which was most damaging to his claims.

will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." 106 S.Ct. at 2511.

In this case, the hodgepodge of evidence submitted by Petitioner in response to the summary judgment motion was simply not probative of any material issue. The numerous day-to-day notes, memos, and correspondence relied on by Petitioner merely demonstrated that he may have been attempting to do his job; they did not show that he was meeting his superior's expectations. In his Petition to this Court, he refers to some insidious "plan" of the employer to discriminate against older employees (Petition at 6), but he never supported this contention with "specific facts" as required by Rule 56. Finally, while statistical evidence *may* be relevant to the issue of intent in an alleged disparate treatment case, *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 580 (1978), this Court admonished in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1976), that "statistics * * * come in infinite variety * * * their usefulness depends on all of the surrounding facts and circumstances." As noted by the Court of Appeals, Petitioner's "statistics" were devoid of the facts necessary to give them any probative value.

CONCLUSION

The instant Petition raises neither vital questions of federal law nor does it involve conflicting decisions among the courts of appeals. Accordingly, and for all the foregoing reasons herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL A. WARNER*
JOHN W. POWERS
GEORGEANNE H. TILSON
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Respondent

* Counsel of Record